

Manimaran a/l Amas v Public Prosecutor and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS
A-05-189-07 OF 2013, A-05-190-07 OF 2013 AND A-05-191-07 OF
2013

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MOHTARUDIN BAKI, TENGKU MAIMUN AND ABANG ISKANDAR
JJCA
31 OCTOBER 2014

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*Criminal Procedure — Appeal — Appeal against conviction and sentence
— Appeal against decision of the High Court — Accused persons charged for
causing death — Sentenced to death — Defence of mere denial — Whether there
was common intention — Whether prosecution proved prima facie case
— Whether accused persons should have been called to enter defence — Penal
Code ss 34 & 302*

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*Criminal Procedure — Charge — Defective charge — Allegation that consent of
public prosecutor under s 177A(1) of the Criminal Procedure Code defective
— Whether caused charge to be defective as well in that it was argued to be
defective, resulting in the charge being defective as well — Whether there were
merits in issue — Whether inconsistencies occasioned any injustice — Whether
curable — Criminal Procedure Code s 422*

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The appellant was charged under s 302 read together with s 34 of the Penal Code for causing the death of one Sindambaran ('the deceased'). According to the prosecution's case, the deceased's wife ('SP8') had gone to bed when she was awakened by the noise of the curtain being pulled. When she came out to the hall, she saw the deceased being surrounded by six Indian men wearing masks and armed with parangs. There was a pool of blood near the floor where the deceased was seated. The robbers got away with SP8's jewelries, a money box, a DVD player, a few sarees and a Proton Waja car. The deceased died the following day due to excessive bleeding as a result of slash wounds. The investigation into the incident led to the arrests of the first to third appellants in three different places. The investigation by the police also led to the discovery of a finger print of the first appellant on the grille at the back door of the house; the recovery of the DVD player and the Proton Waja car. The appellants denied being involved in the murder and argued that they were not at the scene at the material date and time. They also stated that they did not know each other before their arrests. At the conclusion of the trial, the trial judge found that the defence of each of the appellants had failed to create a reasonable doubt on the prosecution's case and that the prosecution had succeeded in proving its case beyond reasonable doubt. All the three appellants

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- A were convicted and sentenced to death. Hence, the present appeal. The common ground raised by the appellants was that the prosecution had not proved no prima facie case and that they ought not to have been called upon to enter on their defence.
- B **Held**, dismissing the appeal; affirming the conviction and sentence of the High Court:
- C (1) The failure of the three appellants to put their case to the prosecution witnesses had affected the credibility and weight of the defence which had moved the learned trial judge to dismiss the defence as being an afterthought or a recent invention (see para 29).
- D (2) The second appellant had submitted on the issue of consent of the public prosecutor under s 177A(1) of the Criminal Procedure Code ('CPC') in that it was argued to be defective, resulting in the charge being defective as well. The consent speaks of consent to prosecute the appellants 'bersama tiga orang lagi yang masih bebas' for the offence under s 302, but the charge itself is absent of those words. It was further argued that although the name of the deceased was stated in the charge, it was not stated in the consent. There were no merits in this issue which merely
- E concerned the inconsistencies between the consent and the charge. The inconsistencies had not occasioned any injustice to the appellants and could be cured under s 422 of the Criminal Procedure Code (see paras 30–31).
- F **[Bahasa Malaysia summary]**
Perayu dituduh di bawah s 302 di baca bersama dengan s 34 Kanun Keseksaan kerana menyebabkan pembunuhan seorang yang bernama Sindambaran ('si mati'). Mengikut kes pihak pendakwaan, isteri si mati ('SP8') sedang tidur apabila dia dikejutkan oleh bunyi langsir ditarik. Apabila dia keluar ke ruang
- G tamu, melihat si mati dikelilingi oleh enam orang India memakai topeng dan bersenjatakan parang. Terdapat lumuran darah di sebelah lantai di mana si mati sedang duduk. Perompak melarikan diri dengan barang kemas SP8, kotak wang, pemain DVD, beberapa sari dan kereta Proton Waja. Si mati meninggal dunia keesokan harinya akibat daripada pendarahan berlebihan akibat kesan
- H luka. Siasatan ke atas kejadian tersebut membawa kepada penangkapan perayu-perayu pertama dan ketiga daripada tiga tempat berlainan. Siasatan oleh pihak polis juga membawa kepada penemuan cap jari perayu pertama atas gril pintu belakang rumah; penemuan semula pemain DVD dan kereta Proton Waja. Perayu-perayu menafikan daripada terlibat dalam pembunuhan dan
- I berhujah bahawa mereka tidak berada di tempat kejadian pada masa dan tarikh material. Mereka juga menyatakan bahawa mereka tidak mengetahui satu sama lain sebelum penangkapan mereka. Pada akhir perbicaraan, hakim perbicaraan mendapati pembelaan setiap perayu-perayu telah gagal untuk membentuk keraguan munasabah atas kes pihak pendakwaan dan bahawa pihak

pendakwaan telah berjaya dalam membuktikan kesnya melampaui keraguan munasabah. Ketiga-tiga perayu disabitkan dan dijatuhkan hukuman mati. Maka rayuan ini. Alasan biasa yang dibangkitkan oleh perayu-perayu adalah bahawa pihak pendakwaan tidak membuktikan kes prima facie dan bahawa mereka tidak patut dipanggil untuk memasukkan pembelaan mereka.

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Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman Mahkamah Tinggi:

- (1) Kegagalan ketiga-tiga perayu untuk membela kes mereka terhadap saksi-saksi pihak pendakwaan telah menjejaskan kebolehpercayaan dan berat pembelaan yang telah membuatkan hakim perbicaraan menolak pembelaan sebagai sesuatu yang difikirkan kemudian atau rekaan terbaharu (lihat perenggan 29).
- (2) Perayu kedua telah berhujah atas isu izin pihak pendakwaan di bawah s 177A(1) Kanun Tatacara Jenayah ('KTJ') di mana ia diujahkan sebagai cacat, mengakibatkan tuduhan juga adalah cacat. Izin menyatakan izin untuk mendakwa perayu-perayu bersama tiga orang lagi yang masih bebas untuk kesalahan di bawah s 302, tetapi tuduhan itu sendiri tidak mempunyai perkataan-perkataan tersebut. Ia selanjutnya diujahkan bahawa walaupun nama si mati dinyatakan di dalam tuduhan, ia tidak dinyatakan di dalam izin. Tidak terdapat merit dalam isu ini yang hanya berkenaan percanggahan di antara izin dan tuduhan. Percanggahan tidak menyebabkan apa-apa ketidakadilan kepada perayu-perayu dan boleh diatasi di bawah s 422 KTJ (lihat perenggan 30–31).]

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Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1318–1360.

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Cases referred to

Megat Halim bin Megat Omar v PP [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)

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Pendakwa Raya lwn Sulaiman bin Saidin [2010] 3 MLJ 383, CA (refd)

PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)

Wong Swee Cin v PP [1981] 1 MLJ 212, FC (refd)

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Legislation referred to

Criminal Procedure Code ss 182A, 402A, 422

Evidence Act 1950 ss 8, 27

Penal Code ss 34, 302

A Appeal from: Criminal Trial No 45–30 of 2009 (High Court, Ipoh)

Stanislaus Vethanayagam (M S Vethanayagam & Assoc) in Criminal Appeal No A-05–189–07 of 2013 for the appellant.

Azizzul Sharman bin Mat Yusoff (Azizzul & Ariff) in Criminal Appeal No A-05–190–07 of 2013 for the appellant.

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Mohammad Yunus bin Mohd @ Ahmad Ali (Yunus Ali & Kam) in Criminal Appeal No A-05–191–07 of 2013 for the appellant.

Mohd Fairuz bin Johari (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal Nos A-05–189–07 of 2013, A-05–190–07 of 2013 and

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A-05–191–07 of 2013 for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

D [1] We heard the three appeals together. The appellant in Appeals Nos A-05–189–07 of 2013; A-05-190-07 of 2013 and A-05-191-07 of 2013 were the first accused, the second accused and the third accused respectively in the High Court at Ipoh. They were charged under s 302 read together with s 34 of the Penal Code for causing the death of one Sindambaran a/l Nadeson. We had dismissed the appeals. We now give our reasons for the said decision.

E [2] The prosecution's case, briefly, is as follows. On 11 January 2009, the deceased was at home in Buntong, Ipoh. At about 10.30pm, his wife ('SP8') went to bed while the deceased was watching television. The wife was awakened by the noise of the curtain being pulled. She came out to the hall and saw the deceased being surrounded by six Indian men armed with parangs and there was a pool of blood near the floor where the deceased was seated.

F [3] All the men were wearing masks. Apart from the jewellery of SP8, the robbers got away with a money box, a DVD player, a few sarees and a Proton Waja car. The deceased was sent to the hospital but he died the following day. The cause of death as certified by the forensic expert ('SP9') was excessive bleeding due to slash wounds.

G [4] The investigation into the incident led to the arrests of the first appellant in Bukit Sentosa; the second appellant in Batu Caves and the third appellant in Teluk Panglima Garang, in Selangor. The investigation by the police also led to the discovery of a finger print of the first appellant on the grille at the back door of the house; the recovery of the DVD player and the Proton Waja car.

H [5] At the end of the prosecution's case, the learned trial judge made the following finding on the first appellant (p 21 *rekod rayuan (kes pendakwaan)*):

I ... the prosecution had at least proven that the presence of the 1st Accused at the scene of the crime. But the prosecution was yet to prove that the 1st accused was

present on the date and time as alleged in the charge. Even if the prosecution could prove that the 1st Accused was present at the scene of the crime on the date and time alleged in the charge, that evidence alone without more, is insufficient to prove that he was one of the six Indian men who had slashed the deceased let alone to form the basis of a finding of guilt on a charge of murder against him.

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[6] In respect of the second appellant, the learned trial judge said (pp 21–22, 27 *rekod rayuan (kes pendakwaan)*):

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The prosecution had first established through SP7 and SP8 that a Proton Waja AFR 2356 registered in the name of Renuga a/p Sindambaram together with some jewellery, 20 sarees and a DVD player had been reported stolen from the house at 759 Jalan Wayang, Buntung Ipoh (see Exhibit P16).

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The prosecution had also proven that the burnt Proton Waja found by the road side of Jalan Besar Banting Teluk Panglima Garang belonged to SP7, the deceased's daughter by showing the chassis number found on the burnt Proton Waja ...

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Since the Proton Waja was the only incriminating evidence which could link the 2nd Accused to this crime of murder, the prosecution claimed that it was discovered in consequence of the information given by the 2nd Accused after his arrest.

The prosecution sought to admit during the trial, the information, that is 'saya boleh tunjukkan tempat bakar itu kereta di Banting' contained in a document marked as ID49 under section 27 of the Evidence Act 1950.

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... I find that the requirements of section 27 had not been strictly complied with by the prosecution and therefore reject the prosecution's application in admitting such information.

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[7] As regards the third appellant, the finding of the learned trial judge was as follows (pp 27–28 *rekod rayuan (kes pendakwaan)*):

After the arrest of the 3rd Accused, he had led SP17 and his men to the discovery/recovery of the 4 parangs, one DVD player, one T-shirt and one pair of jeans (trousers) from a house at LMS 248, Jalan Ladang Teluk Datok Banting, Kuala Langat and had subsequently led SP26 to the recovery/discovery of 12 broken pieces of a car registration number plate AFR 2356 by the side of Jalan Besar Jalan Bagan Kebun Bharu Batu 9 Teluk Panglima Garang.

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Of all the exhibits recovered there are only two exhibits which could link the 3rd accused to the crime of murder, that is the LG DVD player Exhibit P17 and the broken pieces of number plate (P88, P89 (A-D), P90, P91 and P92 (A&B)).

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It has been proven by the prosecution that the LG DVD player recovered by the police belonged to the deceased. Whereas the 12 broken pieces of number plate AFR 2356 was similar to the Registration number of the Proton Waja owned by SP7 the deceased's daughter.

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Again the prosecution was seeking to admit the information given separately by the 3rd Accused to SP17 and SP26 which had resulted in the discovery of the aforesaid 2 exhibits under section 27 of the Evidence Act 1950.

A [8] The learned trial judge similarly found that the information given by the third appellant was not information leading to discovery under s 27 of the Evidence Act. At p 34, the learned trial judge went on to state:

B With the rejection of all the information leading to discovery sought to be admitted by the prosecution, the evidence of the recovery of the incriminating objects namely, the LG DVD player, the Waja frame and the broken pieces of number plate is still admissible. Obviously, such evidence, by itself is not sufficient to prove that the 2nd and the 3rd Accused had broken into the deceased's house and had slashed the deceased.

C The prosecution submitted at the end of the prosecution case that the conduct of the 2nd and the 3rd Accused leading the police party and pointing out the place where the incriminating articles were found would be admissible as conduct under section 8 of the Evidence Act 1950 even though such information leading to discovery had been ruled inadmissible by the Court.

D I am in fact of the view that the conduct of leading the police party to where the incriminating exhibits were recovered and the act of pointing by the 2nd and 3rd Accused should be admitted under section 8 of the Evidence Act 1950. However, the admission of such evidence only goes to prove that they knew the existence of such incriminating articles. This is only a piece of circumstantial evidence which by itself is still not sufficient to prove that it was the 2nd and 3rd Accused who had slashed the deceased on the day and time in question.

F [9] The learned trial judge thus found that no prima facie case had been made out against the appellants. The appellants were acquitted and discharged.

[10] Dissatisfied with the decision, the prosecution appealed to the Court of Appeal. The prosecution's appeal was allowed and all the three appellants were ordered to enter their defence by the Court of Appeal.

G THE DEFENCE

H [11] All the three appellants gave evidence under oath. Essentially, all the appellants denied being involved in the murder. They said that they were not at the scene at the material date and time. They also stated that they did not know each other before their arrests. The second and the third appellants further denied giving any information to the police leading to the discovery of the incriminating items.

I [12] The first appellant had given an explanation how his fingerprint was found on the grille at the back door of the deceased's house. He said that sometime at the end of December 2008, he and a friend by the name of Rajah had attended a prayer ceremony in Buntong temple. After the ceremony ended, he had helped Rajah to send some boxes containing prayer items to the

house of the deceased. They entered the house through the back door. He opened and held the grille of the back door while Rajah carried the boxes into the back portion of the house. A

[13] The second appellant testified that he was in the business of recycling and dealing with scrap metal; that he had a friend, Jegan who was a runner; that Jegan had informed him that Jegan had a Proton Waja for scrap because of non-payment of the finance; that Jegan had asked him whether he wanted the car and requested RM2,000 for the scrap; that he told Jegan that he would not take the car without the registration card and that Jegan told him that Jegan would obtain the registration card from the owner. B C

[14] It was further the evidence of the second appellant that because his customers had needed some spare parts, he then called Jegan about the Proton Waja. Jegan had told the second appellant that the owner wanted to claim insurance and that Jegan had surrendered the car to a friend to be burnt in Banting. D

[15] As for the third appellant, he stated that the DVD player was given to him by his friend, Maaveeran, three days before his arrest; that Maaveeran had asked him to keep the DVD player and that Maaveeran would come and take it back in two weeks time. On the parangs, the third appellant gave evidence that they belonged to his brother in law who had used the parangs to hunt for monitor lizards. E F

[16] At the conclusion of the trial, the learned trial judge found that the defence of each of the appellants had failed to create a reasonable doubt on the prosecution's case and that the prosecution had succeeded in proving its case beyond reasonable doubt. All the three appellants were convicted and sentenced to death. G

THE APPEAL

[17] The common ground raised by learned counsel for all the appellants was that the prosecution had not proved common intention under s 34 of the Penal Code. H

[18] For the first appellant, learned counsel argued that there was no credible evidence against the first appellant and that the fingerprint was insufficient to link the first appellant with the murder. It was further argued that the Court of Appeal had erred in law and in fact in calling upon the first appellant to enter on his defence and that the defence had raised a reasonable doubt on the prosecution's case as the appellant was not at the scene of the crime. I

- A** [19] The second appellant canvassed the following grounds of appeal:
- (a) the consent to prosecute and the charge was defective;
 - (b) the learned trial judge misdirected himself in labeling the defence as an afterthought; and
- B** (c) the admissibility of ID 49.

[20] For the third appellant, learned counsel submitted on the following issues:

- C** (a) there was no conclusive evidence to prove that the third appellant was present at the place and time of the murder;
- (b) there was no link between the third appellant and the exhibits recovered ie the DVD player and the parangs;
- D** (c) the DVD player and the broken pieces of number plate were not discovered pursuant to s 27 of the Evidence Act.

E [21] We noted that central to the submissions of learned counsel for all the appellants was whether the circumstantial evidence relied upon by the prosecution was strong enough to link all the appellants with the offence of murder. We found that the complaint of the appellants was basically that there was no prima facie case and that they ought not to have been called upon to enter on their defence.

F [22] In the course of the submissions, we had sought clarification from learned counsel and it was made clear to us that what we were urged to do was to revisit the decision of the previous panel of this court in calling upon the appellants to enter on their defence.

G [23] Whilst the appellants may, when an appeal is pursued further at the Federal Court, argue that the Court of Appeal erred in calling upon the appellants to enter on their defence, we, on our part were in no position to review the said decision of the previous panel of the Court of Appeal. The instant appeal, in our view, should focus on whether the defence had raised a reasonable doubt on the prosecution case.

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I [24] We were mindful of the provision of s 182A of the Criminal Procedure Code which requires the court to consider all the evidence at the conclusion of the trial. This exercise would necessarily entail the consideration of the defence in the light of the prosecution's case as had been made clear by the Federal Court in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 where it is stated thus:

If the court, upon a maximum evaluation of the evidence placed before it at the close

of the prosecution case, comes to a conclusion that a prima facie case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a prima facie case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the prima facie case one that is established beyond reasonable doubt. ...

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[25] In the instant appeal, since all the appellants were called upon by the Court of Appeal to enter on their defence, it must necessarily mean that the Court of Appeal was satisfied that the prosecution had proved all the ingredients of the charge, including the element of common intention, before concluding that a prima facie case had been made out by the prosecution. There was therefore no necessity for us to revisit the issues on whether a prima facie case had been made out. What we need to consider was whether the evidence from the defence had cast a reasonable doubt on the prosecution's case.

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[26] This approach had also been clearly stated in the case of *Pendakwa Rayan lwn Sulaiman bin Saidin* [2010] 3 MLJ 383 where Sulaiman Daud JCA said:

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[27] Sebelum merumuskan isu atau isu-isu berbangkit dalam rayuan ini, kami mendapati perlu untuk mengulangi bahawa tertuduh telah dipanggil untuk membela diri setelah mahkamah ini, dalam rayuan terdahulu, mengetepikan keputusan hakim bicara di akhir kes pendakwaan. Sehubungan dengan itu, kami mendapati tiada keperluan bagi kami untuk menimbangkan semula isu-isu yang telah diputuskan oleh mahkamah ini terdahulu mengenai isu-isu yang telah dibangkitkan di akhir kes pendakwaan, kecuali jika terdapat keterangan-keterangan baru yang dibangkitkan oleh pihak pembelaan yang boleh menimbulkan keraguan yang munasabah ke atas kes pendakwaan.

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[27] The learned trial judge was therefore correct when he stated thus in his judgment (p 563 *rekod rayuan (kes pembelaan)*):

In considering the defence put forward by all the three accused persons, I have to bear in mind that the Court of Appeal which had stood in the shoes of the trial judge found that the prosecution had established a prima facie case against all the accused persons based on the evidence adduced at the end of the prosecution case. In other words, the evidence adduced by the prosecution has satisfied the maximum evaluation test.

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My duty at the end of the defence is to consider whether the defence put forward, whether believable or unbelievable has created a reasonable doubt in the prosecution case.

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[28] Insofar as the defence is concerned, the learned trial judge made the

- A following finding (pp 563–565 *rekod rayuan (kes pembelaan)*):
- I find that the common defence put forward by all the three accused persons was that they were not present at the scene of the crime on the day and time in question. They said they were elsewhere.
- B ... I find that such a defence cannot be considered as an alibi defence under Section 402A of the Criminal Procedure Code, as they failed to give a 10 days' notice as required by the relevant provision.
- ...
- All the accused have introduced new facts in their respective defence as follows:
- C (i) The 1st Accused person was trying to explain why his fingerprint was left at the back grill door of the deceased's house when he delivered the boxes to the deceased's house with his friend Rajah.
- (ii) The 2nd Accused person had given a different version of his encounter with one runner by the name of Jeganathan who asked him whether he wanted to buy the Proton Waja as scrap for RM2000.00 but Jeganathan subsequently told him that since the owner wanted to claim insurance and Jeganathan had instructed his friend to burn the car in Banting.
- D (iii) The 3rd Accused person said it was Maaveeran who asked him to keep the said DVD and promised to claim it from him in two weeks' time.
- E Having considered the new facts raised in the first time in the defence, I find that these new defences are afterthoughts as they were never put or suggested to the prosecution witnesses at the prosecution stage.
- F [29] The failure of the three appellants to put their case to the prosecution witnesses had affected the credibility and weight of the defence which had moved the learned trial judge to dismiss the defence as being an afterthought or a recent invention (*Wong Swee Cin v Public Prosecutor* [1981] 1 MLJ 212; *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; *Megat Halim bin Megat Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 154). We found no
- G appealable error by the learned trial judge in making the above finding on the defence.
- H [30] Learned counsel for the second appellant had also submitted on the issue of consent of the public prosecutor under s 177A(1) of the Criminal Procedure Code (exh P1) which was argued to be defective, resulting in the charge being defective as well.
- I [31] The consent speaks of consent to prosecute the appellants 'bersama tiga orang lagi yang masih bebas' for the offence under s 302, but the charge itself is absent of those words. And although the name of the deceased was stated in the charge, it was not stated in the consent. We found no merits in the issues raised by learned counsel, which merely concerned the inconsistencies between the consent and the charge. In our view, the inconsistencies had not occasioned

any injustice to the appellants and could be cured under s 422 of the Criminal Procedure Code. A

[32] Having regard to all the above, we unanimously dismissed the appeal of all the appellants and affirmed the conviction and sentence of the High Court against all of them. B

Appeal dismissed; conviction and sentence of the High Court affirmed.

Reported by Afiq Mohamad Noor C

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